Kentucky Fried Chicken, Caribbean Holdings, Inc. *and* Virgin Islands Workers Union, HEREIU, AFL–CIO. Cases 24–CA–8475 and 24–CA–8584

January 30, 2004

DECISION AND ORDER

BY MEMBERS LIEBMAN, SCHAUMBER, AND WALSH

On May 4, 2001, Administrative Law Judge C. Richard Miserendino issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions as modified and to adopt the recommended Order as modified.[2]

This case concerns the Respondent's efforts to undermine its employees' collective-bargaining representative when it was on the brink of agreement with that union on a new collective-bargaining agreement. We agree with the judge that the Respondent, in speeches delivered to the employees at each of the Respondent's stores in September 1999, violated Section 8(a)(1) by soliciting its employees to withdraw their support from the Union. We also find, in agreement with the judge, that the speeches additionally violated Section 8(a)(1) because they contained statements implying that the Union was not necessary for employees to receive a wage increase and that the Union was to blame because employees did not receive a wage increase.[3]

In affirming these violations, we have carefully considered the decision of the District of Columbia Circuit Court of Appeals in *Exxel-Atmos, Inc. v. NLRB*,[4] where the court denied enforcement to the Board's holding that the employer had unlawfully instigated a decertification petition. There, the employer's president met with employees and told them that the employer was required to bargain with the union unless it was decertified, briefly and accurately described the decertification procedure, and told the employees to contact the Board for more information. The employer also assured employees that it would comply with its legal obligations and would not take action against anyone because they did or did not sign a petition. This case is distinguishable from *Exxel-Atmos*. Here, the Respondent did not refer employees to the Board, but implicitly solicited them to convey statements of disaffection directly to the Respondent and, rather than assure employees against reprisals or benefits for signing or not signing any petition, it implied that employees had not received wage increases because they were represented by the Union and that the Union was not necessary for them to receive a wage increase. After a careful review of all the circumstances of this case, including those mentioned above, we find that employees hearing the Respondent's speeches would reasonably believe they were being asked to provide evidence, which the Respondent currently lacked, to support an employer-initiated decertification effort before the anticipated agreement on a new contract could bar such an effort. We therefore affirm the judge's finding of a Section 8(a)(1) violation.

The judge also found that a statement within the speeches violated Section 8(a)(1) by implying that the Union was not needed to obtain a retroactive wage increase. We reverse this finding. The Respondent told employees that it had offered to the Union "to make any bargained raise retroactive to March 12, 1999. . . . So, you should know that the break in negotiations will not be adverse to you." On its face, the statement provides only that "bargained" raises will be retroactive. The statement contains no implication that the Union was not necessary for any wage increase to be retroactive; continued union representation would be necessary for a raise to be "bargained."

We adopt the judge's conclusion that the Respondent violated Section 8(a)(5) by withdrawing recognition from the Union on the basis of statements of employee disaffection submitted to the Respondent following the September speeches. The judge found, and we agree, that the

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] We have modified the judge's recommended Order and notice to reflect the violations found.

[3] The Respondent has excepted to the judge's finding that these statements (and an additional statement, discussed below, implying that the Union was not necessary for a retroactive wage increase) were unlawful. The Respondent has not, however, excepted to the judge's conclusion that it was appropriate to find the independent violations of Sec. 8(a)(1), even though they were not alleged in the complaint, because the issues were fully and fairly litigated.

[4] 147 F.3d 972 (D.C. Cir. 1998), denying enf. to 323 NLRB 884, 885 (1997).

withdrawal of recognition was not based on a good faith uncertainty concerning the Union's continued majority status in light of the unfair labor practices committed by Respondent prior to its withdrawal of recognition, i.e. its unlawful solicitation of employee disaffection, and its unlawful statements blaming the Union for the delay in granting a wage increase and implying that employees did not need the Union to obtain a wage increase discussed above.[5] These statements obviously tended to undermine the Union's support among unit employees. We also agree with the judge that Respondent unlawfully failed to bargain with the Union over the reassignment of delivery duties previously assigned to employee Kennedy Caines.

Affirmative Bargaining Order

Finally, we also agree with the judge, for the reasons fully set forth in *Caterair International*, 322 NLRB 64 (1996), that an affirmative bargaining order is warranted in this case as a remedy for the Respondent's unlawful refusal to bargain with the Union. We adhere to the view, reaffirmed by the Board in that case, that an affirmative bargaining order is "the traditional, appropriate remedy for an 8(a)(5) refusal to bargain with the lawful collective-bargaining representative of an appropriate unit of employees." Id. at 68.

In several cases, however, the U.S. Court of Appeals for the District of Columbia Circuit has required that the Board justify, on the facts of each case, the imposition of such an order. See, e.g., *Vincent Industrial Plastics v. NLRB*, 209 F.3d 727 (D.C. Cir. 2000); *Lee Lumber & Bldg. Material v. NLRB*, 117 F.3d 1454, 1462 (D.C. Cir. 1997); and *Exxel/Atmos v. NLRB*, 28 F.3d 1243, 1248 (D.C. Cir. 1994). In *Vincent*, the court summarized its requirement that an affirmative bargaining order "must be justified by a reasoned analysis that includes an explicit balancing of three considerations: (1) the employees' Section 7 rights; (2) whether other purposes of the Act override the rights of employees to choose their bargaining representatives; and (3) whether alternative remedies are adequate to remedy the violations of the Act." Id. at 738.

Although we respectfully disagree with the court's requirement, for the reasons set forth in *Caterair*, we have examined the particular facts of this case as the court would require and find that a balancing of the three factors warrants an affirmative bargaining order. The Union is an incumbent union that has a presumption, albeit rebuttable, of majority status. It has represented the bargaining unit for over ten years and it has successfully negotiated several contracts on the employees' behalf. By February 1999, the parties had agreed on all elements of a successor agreement except a wage increase and Respondent anticipated reaching agreement on this issue when bargaining resumed. Thereafter, however, Respondent repeatedly cancelled and postponed bargaining sessions followed six months later by Respondent's unlawful solicitation of employee dissatisfaction at mandatory employee meetings at each of its stores. At the time of the meetings, there was little evidence of employee dissatisfaction with the Union. The Respondent's written speech included statements that could reasonably lead employees to unfairly question the union's continued financial viability; claimed, without support, that most new employees do not favor the union; and seemed to hold out as a carrot a promised retroactive wage increase blaming the Union for the employees having to wait so many years for a raise. The Respondent's implicit suggestion that employees bring to management's attention any dissatisfaction they had with the union was made without assurances against reprisals for those that did not or promises of benefit for those employees who did. Further in this regard, as the judge found, "there is no evidence that the employees had filed or were planning to file a decertification petition."

In sum, to the extent there was substantial employee disaffection with the union, it was artificially engineered by Respondent. The withdrawal of recognition and refusal to bargain has put the employees in the position of having been without a bargaining relationship for nearly four years. It seems appropriate, therefore, on this record, with insufficient objective evidence of untainted employee dissatisfaction with the Union, to require that a bargaining relationship be established for a reasonable period of time to enable the Union to attempt to restore itself to the exclusive representative bargaining position it held. Whether it is successful will ultimately be for the employees to decide. Alternative remedies do not adequately address the absence of the bargaining relationship here.

(1) An affirmative bargaining order in this case vindicates the Section 7 rights of the unit employees who were denied the benefits of collective bargaining by the Respondent's withdrawal of recognition from the Union and its subsequent unilateral changes in terms and conditions of employment. At the same time, an affirmative

[5] See *Williams Enterprises*, 312 NLRB 937, 939–940 (1993), enfd. 50 F.3d 1280 (4th Cir. 1995) (incumbent union's representative status may not be lawfully challenged in atmosphere of unremedied unfair labor practices that undermine employees' support for union).

We therefore find it unnecessary to pass on the judge's alternative finding that the evidence presented by Respondent in support of its alleged good faith uncertainty was otherwise insufficient to support Respondent's asserted uncertainty of the Union's continued majority status.

bargaining order, with its attendant bar to raising a question concerning the Union's continuing majority status for a reasonable time, does not unduly prejudice the Section 7 rights of employees who may oppose continued union representation because the duration of the order is no longer than is reasonably necessary to remedy the ill effects of the violation. To the extent that such opposition may exist, moreover, it would be at least in part the product of the Respondent's unfair labor practices.

(2) An affirmative bargaining order also serves the policies of the Act by fostering meaningful collective bargaining and industrial peace. That is, it removes the Respondent's incentive to continue its efforts to solicit employee disaffection in the hope of further discouraging support for the Union. It also ensures that the Union will not be pressured by the Respondent's withdrawal of recognition to achieve immediate results at the bargaining table following the Board's resolution of its unfair labor practice charges and issuance of a cease-and-desist order.

(3) A cease-and-desist order, alone, would be inadequate to remedy the Respondent's refusal to bargain with the Union in these circumstances because it would permit a decertification petition to be filed before the Respondent has afforded the employees a reasonable time to regroup and bargain through their representative in an effort to reach a collective-bargaining agreement. Such a result would be particularly unfair in circumstances such as those here, where the Respondent's solicitation of employees to withdraw their support for the Union is likely to have a continuing effect, thereby tainting employee disaffection from the Union arising during that period or immediately thereafter. We find that these circumstances outweigh the temporary impact the affirmative bargaining order will have on the rights of employees who oppose continued union representation.

For all the foregoing reasons, we find that an affirmative bargaining order with its temporary decertification bar is necessary to fully remedy the allegations in this case.

AMENDED CONCLUSIONS OF LAW

Substitute the following for Conclusion of Law No. 5.

"5. By implying on September 24, 1999, that the Union was not needed in order for the employees to obtain a wage increase, and that the Union was to blame because employees had not received a wage increase, the Respondent interfered with, restrained, and coerced employees in the exercise of rights guaranteed them by Section 7 of the Act and thereby violated Section 8(a)(1) of the Act."

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and orders that the Respondent, Kentucky Fried Chicken, Caribbean Holdings, Inc., St. Croix, U.S. Virgin Islands, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(a).

"(a) Unlawfully implying that the Union is not needed in order for the employees to obtain a wage increase and that the Union is to blame because the employees have not received a wage increase"

2. Substitute the following for paragraph 2(c).

"(c) Make Kennedy Caines whole for any lost overtime earnings that he would have received had he continued to perform the delivery duties after January 10, 2000."

3. Substitute the following for paragraph 2(d).

"(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay owed under the terms of this Order."

4. Substitute the attached notice for that of the administrative law judge.

Dated, Washington, D.C., January 30, 2004

Wilma B. Liebman, Member

Dennis P. Walsh, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER SCHAUMBER, dissenting in part and concurring in part.

I agree with my colleagues that the September speeches considered as a whole unlawfully solicited employees to withdraw their support for the Union and, on the basis of this unfair labor practice, agree that the Respondent's subsequent withdrawal of recognition was unlawful as well. I do not, however, agree with my colleagues' adoption of the judge's additional findings of independent Section 8(a)(1) violations based on the Respondent's speeches. The complaint alleges only that the Respondent's September speeches violated Section

8(a)(1) by soliciting employees to withdraw their support from the Union. Thus, I cannot agree that the Respondent, by those speeches, committed additional unalleged violations of Section 8(a)(1), by implying that the Union was not necessary for employees to receive a wage increase and was to blame because employees had not received a wage increase. Further, I see no need to parse the speeches in this manner to identify possible additional violations that would be largely redundant of the Section 8(a)(1) violation alleged and found.[1]

I also do not agree with the view expressed by the Board in *Caterair International*, 322 NLRB 64 (1996), relied upon by my colleagues, that an affirmative bargaining order is "the traditional, appropriate remedy for an 8 (a)(5) violation." The Board's traditional remedy is an order to cease and desist from continuing the violation found, here, a refusal to recognize and bargain with the union, which imposes on the respondent an affirmative obligation to bargain. An affirmative bargaining order does no more, with one significant difference, it imposes a bar on employee decertification efforts. For this reason, I agree with the District of Columbia Court of Appeals that an affirmative bargaining order is an "extreme remedy." *Vincent Industrial Plastics v. NLRB*, 209 F.3d 727, 738 (2000). Whether it is appropriate requires a thoughtful reasoned analysis of the facts, 209 F.3d at 736, in order to properly balance the "often competing interests" of protecting the union that had been selected by the employees as their exclusive bargaining representative and the employee's free choice to select another union or no union at all. See *Exxel/Atmos, Inc. v. NLRB*, 28 F.3d 1243, 1248 (D.C. Cir. 1994). Indeed, I fail to understand why my colleagues in the majority fail to adopt the D.C. Circuit's reasoned views as their own.

Nevertheless, the majority has undertaken the analysis required by the District of Columbia Circuit Court of Appeals. I join in their finding that, under the circumstances of this case, an affirmative bargaining order is justified.

Dated, Washington, D.C., January 30, 2004

Peter C. Schaumber, Member

NATIONAL LABOR RELATIONS BOARD

[1] I agree with my colleagues that, contrary to the judge, the Respondent's speeches did not additionally violate Sec. 8(a)(1) by implying that the Union was not needed to obtain a retroactive wage increase. I also agree with my colleagues' adoption of the finding that the Respondent violated Sec. 8(a)(5) by failing to bargain over the reassignment of delivery duties.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT unlawfully imply that the Union is not needed in order for the employees to obtain a wage increase and that the Union is to blame because the employees have not received a wage increase.

WE WILL NOT solicit support for our petition for a representational election and encourage employees to withdraw support from the Virgin Islands Workers Union, HEREIU, AFL–CIO.

WE WILL NOT refuse to recognize and bargain collectively in good faith with respect to wages, hours, and other terms and conditions of employment with the Virgin Islands Workers Union, HEREIU, AFL-CIO, as the exclusive collective-bargaining representative of our employees in the following appropriate unit:

INCLUDED: All service and maintenance employees, including warehouse employees, employed by the Employer at its restaurants located in Sunny Isle, Golden Rock, and Fredericksted, St. Croix, U.S. Virgin Islands.

EXCLUDED: All managerial employees, office clerical employees, guards and supervisors as defined in the Act.

WE WILL NOT refuse to bargain collectively with the Virgin Island Workers Union, HEREIU, AFL–CIO by unilaterally changing the terms and conditions of employment of Kennedy Caines.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, recognize and bargain in good faith with the Virgin Island Workers Union, HEREIU,

AFL–CIO, as the exclusive bargaining representative of our employees with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment and, if an agreement is reached, embody such understanding in a signed agreement.

WE WILL rescind our decision to transfer the delivery duties performed by Kennedy Caines prior to January 10, 2000 and immediately reassign those delivery duties to him.

WE WILL make Kennedy Caines whole for any lost overtime earnings that he would have received had he continued to perform the delivery duties after January 10, 2000.

WE WILL recognize and bargain in good faith with the Virgin Islands Workers Union, HEREIU, AFL-CIO, concerning the terms and conditions of employment of Kennedy Caines.

KENTUCKY FRIED CHICKEN CARIBBEAN HOLDINGS, INC.

Elicia L. Marsh-Watts, Esq., for the General Counsel.
Maria Milagros Soto, Esq., of Dorado, Puerto Rico, for the Respondent.

DECISION

STATEMENT OF THE CASE

C. RICHARD MISERENDINO, Administrative Law Judge. This case was tried in St. Croix, U.S. Virgin Islands on August 24 and 25, 2000. On October 19, 1999, the Virgin Islands Workers Union, Local 611 (Union), an affiliate of the Hotel Employees and Restaurant Employees International Union, AFL-CIO, (HEREIN) filed a charge alleging that Kentucky Fried Chicken, Caribbean Holdings, Inc. (Respondent) has unlawfully refused to recognize and bargain with the Union and sought to persuade its employees to resign membership in the Union in violation of Section 8(a)(1) and (5) of the Act. On December 30, 1999, a complaint was issued and on February 1, 2000, a timely answer was filed.

On March 21, 2000, the Union filed a second charge alleging that on January 10, 2000, the Respondent unlawfully and unilaterally changed the terms and conditions of employment of Union Steward Kennedy Caines without notifying or bargaining with the Union in violation of Section 8(a)(5) of the Act. On July 19, 2000, the cases were consolidated and an amended complaint was issued. The Respondent filed a timely amended answer.

The parties have been afforded a full opportunity to appear, present evidence, examine and cross-examine witnesses, and file briefs.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporation, operates three Kentucky Fried Chicken (KFC) restaurants in St. Croix, U.S. Virgin Islands, and also maintains an office and place of business in San Juan, Puerto Rico, where it annually derives gross revenues in excess of $500,000. The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The Respondent also admits, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Questioning the Union's Majority Status

1. Background

In 1984, the Union became the exclusive bargaining representative of the Respondent's employees in the following appropriate unit:

> INCLUDED: All service and maintenance employees, including warehouse employees, employed by the Employer at its restaurants located in Sunny Isle, Golden Rock and Fredericksted, St. Croix, U.S. Virgin Islands.
>
> EXCLUDED: All managerial employees, office clerical employees, guards and supervisors as defined in the Act.

In 1988, Local 611 was placed into trusteeship by its international union and remained in trusteeship through the date of trial. (R. Exh. 10.) Ralph Mandrew has served as the President and trustee of the Union since 1988.

In 1994, PepsiCo International acquired Caribbean Holdings Inc. and continued to operate the three St. Croix KFC restaurants as KFC Caribbean Holdings. Juan Hernandez, an attorney, was a human resources manager for PepsiCo with responsibility for the KFC Caribbean Holdings stores.[1]

Throughout all of these transitions, successive collective bargaining contracts were negotiated, the latest of which covered the period September 1, 1993 to August 31, 1996. On July 15, 1995, the most recent contract between the Union and the Respondent was extended to March 1, 1997, by mutual agreement of the parties. (G.C. Exhs. 2 and 3.)

2. Contract negotiations are initiated

In May 1996, Mandrew told Hernandez that he wanted to commence negotiating a new contract. Even though the contract was not due to expire for another 10 months, Hernandez

[1] In October 1997, PepsiCo divested itself of the KFC restaurants, which were taken over by Tricon Restaurants International, Inc. Hernandez became a Tricon Senior Human Resources Director, with responsibility for three St. Croix KFC restaurants, as well as a St. Croix Taco Bell and Pizza Hut owned by Tricon. He also had human resources responsibility for other Tricon restaurants located on St. Thomas, U.S.V.I. and Puerto Rico.

agreed.[2] The parties met once in August and twice in October 1996 before reaching a tentative
agreement on all open issues, except sick pay, health insurance coverage, and a wage increase. Regarding the latter, the Respondent had proposed giving the employees bonuses based on years of service, rather that across-the-board wage increases.

By letter, dated November 13, 1996, Mandrew advised Hernandez that he had presented the Respondent's proposal to the employees and that they would accept the bonus proposed for 1996 and 1997, as well as an additional holiday that was offered. However, the employees had rejected the sick leave proposal and health insurance proposal, which they wanted to submit to a mediator.

On November 20, 1996, the Respondent's attorney, Maria Milagros Soto, responded indicating that all proposals would have to be accepted in order for there to be a valid contract. (R. Exh. 4.) She pointed out that the employees were now working without a contract and that after reevaluating its economic package, the Respondent would either contact the Union to arrange further negotiations or to declare an impasse.

On December 26, 1996, Attorney Soto advised the Union that the Respondent would not modify its last proposal and that therefore it was a final offer. Soto asked the Union to take the proposal to the employees again with the understanding that this was the Respondent's final offer. (R. Exh. 5.) In early January 1997, Mandrew responded by providing the Respondent with a copy of the contract extension agreement, signed by both parties on July 12, 1995, extending the duration of the collective bargaining agreement to March 1, 1997. (G.C. Exh. 3.) No further negotiations took place between the parties.

3. Negotiations stall

March 1, 1997 came and passed. The contract expired. The Respondent nevertheless adhered to the existing contract terms. In addition, for the next 12 months, the Respondent continued to deduct union dues from the employees' wages.[3]

On May 28, 1998, Hernandez sent Mandrew a letter stating that due to improved sales, the Respondent planned to give merit increases to the employees and that it had undertaken employee performance evaluations for that purpose. (R. Exh. 20; Tr. 283.) The letter stated:

> I know you will be glad to know that effective next week we are giving a salary increase to all our KFC and Pizza Hut associates in St. Thomas and St. Croix, retroactive to January 5, 1998, when we planned and commenced the review process.

By letter, dated June 1, 1998, Mandrew objected to the Respondent giving a unilateral wage increase and urged it to refrain from doing so. Mandrew told Hernandez that the Union was ready to resume negotiations in the latter part of the month.[4] (R. Exh. 21.)

On June 26, Hernandez wrote to Mandrew expressing surprise that the Union would turndown a wage increase. (R. Exh. 23.) After reciting what he believed to be the turn of events leading up to the breakdown in negotiations, Hernandez expressed a doubt that the Union still represented a majority of the employees. Hernandez did not address the ulp charge[5] nor did he respond to Mandrew's request to resume negotiations.

4. Negotiations resume and progress

On November 16, Mandrew wrote to Hernandez requesting again to meet and discuss "wage increases and other issues that are of concern to the employees." (R. Exh. 26.) He also offered to meet with the Respondent any day from December 1-15, 1998. On November 27, Hernandez advised Mandrew that the Respondent was willing to continue negotiations, but that due to several pressing matters, its bargaining team would be unavailable until January 18–19, 1999. (R. Exh. 27.)

The parties eventually met on February 4, 1999, and agreed on sick leave and insurance provisions. The wage increase was the only remaining unresolved issue.

5. The Respondent repeatedly cancels and postpones additional bargaining sessions

A negotiation session was scheduled for March 12, 1999, but the Respondent postponed the session until April 16, and postponed it again due to the ill health of the Respondent's chief negotiator, Attorney Soto. In postponing the April 16 session, Soto told Mandrew:

> Since the last two postponements have been on my account, and I do not wish to affect employees rights and expectancies, today I suggested to Juan–and he has authorized–an offer to you that KFC will give contract retroactivity to March 12, 1999 *if in our next session of negotiations we reach a full agreement as we anticipate will be the case.* It is premature today to advance a tentative date for negotiation; but rest assured that we will communicate with you shortly. (Emphasis added.) (G.C. Exh. 4B.)

Over the next few months, the Respondent cancelled and rescheduled negotiations several times for various reasons. In June, Soto advised Mandrew that she and Hernandez would be available to resume negotiations on July 19-21 and that they would be sending him a counterproposal on the wage issue before that meeting. (G.C. Exh. 4D.) Mandrew confirmed that he would be available to meet on those dates and that he was looking forward to receiving the Respondent's counterproposal. (R. Exh. 6.) However, the Respondent cancelled that session at the last minute and rescheduled it for August 30-31, 1999, purportedly because Hernandez was ill. (G.C. Exh. 12, page 1; G.C. Exh. 4E.)

A few days before the August 30 [meeting], the Respondent cancelled that session purportedly because its area manager resigned and it wanted to wait until his replacement arrived before resuming negotiations. (G.C. Exh. 4A.) Ivelisse Varona,

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[2] The evidence shows that Hernandez was unaware of the written contract extension.

[3] In June 1998, the Respondent ceased withholding union dues. (Tr. 279, 294.)

[4] Even though the Respondent did not implement the wage increase, the Union filed a ulp charge on June 11, 1998, alleging that the Respondent had discussed the wage increase with the employees and had failed to meet and bargain with the Union. (R. Exh. 24.)

[5] On October 30, 1998, the charge was withdrawn with the approval of the Board's Regional Office approval.

the Respondent's Human Resources Representative, testified that she explained the circumstances to Mandrew in an August 27 telephone conversation at which time she proposed rescheduling the meeting on September 16-17. (Tr. 231; G.C. Exh. 12, page 5.)[6] Varona stated, however, that Mandrew told her that he would not be available on those dates because he had to fly to New York State for medical reasons. Mandrew asked Varona to fax a letter to him stating the reasons for the postponement, along with "a proposal and that he would send approval back to us." (Tr. 232.) Varona stated that at the end of the conversation, Mandrew told her that he was going to send her some Union authorization cards because the employees were not paying dues.[7]

By letter, dated August 30, 1999, Varona confirmed that the Respondent was postponing the August 31 meeting, but held open the possibility of meeting with the Union in mid-September. She closed the letter by stating:

> As I said before, we are available to meet on September 16 and/or 17th. If you would like to meet on those days, or have other dates available that would be more convenient to you, please let us know. (G.C. Exh. 4A.)

6. Creating doubts about the Union's majority status

On August 31, Varona received facsimile copies of the Union's Form LM-15 (Trusteeship Report) and LM-2 (Labor Organization Annual Reports for 1995–1997) from the U.S. Department of Labor office in San Juan, Puerto Rico. (R. Exh. 10.) The documents showed that the Union was placed in trusteeship on July 1, 1988, because the local union was "in the process of being diversified with some government employees and this along with some other organizing will help us to build up our membership in order to help the local to become more financially stable." (R. Exh. 10, page 2.) The documents also showed that dues receipts increased from $83,155 in 1995 to $95,624 in 1997, even though the amount of regular dues ($16 per month) was unchanged. The increase in dues revenues presumably was caused by an increase in membership which was reported as 373 members by the end of 1995, 386 by the end of 1996, and 491 by the end of 1997. There was no information indicating that the Union was in dire financial straits.

In addition, on or about August 30, 1999, Employee Agnes Austrie provided her store manager with a handwritten statement indicating that she did not want to be in the Union anymore. (R. Exh. 15, page 2.) One other employee, Reuel Young, had submitted a written statement in May 1999 indicating that he wanted to "be out of the union." (R. Exh. 9.)

On or about September 4, 1999, Varona received an envelope in the mail from Mandrew containing 19 authorization/dues deduction cards signed by employees in October - December 1998. (Tr. 236; R. Exhs. 8, 14.) Although she testified that she did not know what to make of the cards, she nevertheless reviewed the cards to determine if they were signed by active employees. Out of 19 cards, one employee, Agnes Austrie, had signed two cards, and five employees were no longer employed by the Respondent. In addition, one card was signed by Reuel Young, who had more recently provided the Respondent with written statements that he no longer wanted to be in the Union.

On September 9, Mandrew phoned Varona and left a message indicating that he was available to meet on September 16. Five days later, on September 14, Varona returned his call advising his secretary that because she had been out of the office for several days she did not receive Mandrew's message until the previous day. Varona further stated that the Respondent was not available to meet on September 16 and 17 as previously indicated because it had made other commitments after Mandrew told her on August 27 that he would not be available.[8] The next day, September 15, Mandrew spoke to Varona by phone indicating that he would be going to New York State the following week and that he would have his secretary contact her by mid-week with other dates for negotiations.

Soon after speaking to Mandrew on September 15, Varona phoned Attorney Soto to discuss her conversation with Mandrew. She also prepared a notice to all St. Croix KFC employees, which was reviewed and approved by Soto, announcing a mandatory meeting at each store on September 23, 1999.[9] In the meantime, Soto and Hernandez prepared a written speech that he would read to the employees at all three St. Croix KFC stores which questioned the Union's financial status, as well as on whether a majority of employees wanted to be represented by the Union.

On September 23, Hernandez, Soto, and Varona met with Reid Miller, the former owner of Kentucky Fried Chicken, Caribbean Holdings, Inc. to ascertain whether the Union became the exclusive bargaining representative after an Board conducted election or whether it was voluntarily recognized. (Tr. 242–243.) Miller was unsure whether there was an election, so Hernandez instructed Varona to contact the NLRB to ascertain how the Union became the employees' exclusive bargaining representative 15 years earlier.

7. The September 24, 1999 meetings

On September 24, Hernandez, Soto, and Varona met for about 20 minutes with the Sunny Isle KFC store before the

[6] According to her telephone journal entry, dated August 27, 1999, prior to speaking to Mandrew, Varona phoned the U.S. Department of Labor requesting financial information about the Union. (G.C. Exh. 12, p. 4.)

[7] Varona intimated that Mandrew told her that as a sign of good faith he would not require her to send the letter afterall and that he would forward the dues deductions cards. She nevertheless sent a letter. (G.C. Exh. 4A.)

[8] Varona's testimony and journal notes (G.C. Exh. 12) are inconsistent with the closing paragraph of her August 30 letter advising Mandrew that the Respondent was ready to meet with the Union on September 16–17. In addition, the journal notes for August 27, do not mention that Mandrew stated he would be unavailable to meet on September 16. For these, and demeanor reasons, I do not credit Varona's testimony that Mandrew told her he would be unavailable on September 16–17, 1999.

[9] Ostensibly the meeting was called to announce the winners of a contest sponsored by the Respondent. (Tr. 258.) In reality, the mandatory meeting was called so that Hernandez could read a prepared written speech about the Union.

store opened.[10] (Tr. 260.) Reading from a written speech, which he and Soto prepared, Hernandez stated the following.

> How are you my friends
>
> This is a quick meeting . . . but one that I thing I owe you even if it may be a little risky for our Company but all in good faith. Because I want to avoid saying something I should not say, please bear with me, if I read my message to you today.
>
> We do not want you to find out that we have given wage raises, yesterday to our STT associates and today to the STX Pizza Hut employees . . . and not to you. I feel we have established . . . and want to keep . . . a good, trusting, working relationship with you, so my motives today rise from our wish to be fair to you.
>
> You will recall that last year we were ready to hand out your wage increases when we received a letter from the union opposing raises that had not been negotiated. We had reached an impasse in our negotiations when you rejected our last offer two years and half ago. And, in fairness to you, we decided to extend to you the same increases we gave then in St. Thomas **since the union had not requested to resume bargaining for almost a year**. We really thought the Union had lost interest in you due to its inaction. But, when Mr. Mandrew opposed our good faith move to give you a raise after so long, we immediately abstained from doing so and committed ourselves in the National Labor Relations Board to resume negotiations with him.
>
> There was no intent to undermine the union then . . . nor is there an intent to undermine the union now. Mr. Mandrew is a gentleman. As opposed to last year, we have resumed negotiations. And, in all truthfulness the delay in reaching an agreement on the economic issue pending has been due to a number of factors . . . all on the company's side. I would never mislead you.
>
> First, our March session had to be cancelled, reassigned only to be cancelled at least two times when our legal counsel, here present, was sick for two whole months with a positional vertigo that disabled her totally. She was not fit to fly for a long time.
>
> Since she felt guilty of the delay, she suggested to me, and I accepted that we offer Mr. Mandrew, in writing, that this delay would not affect the date when your raises would be effective. We offered to make any bargained raise retroactive to March 12, 1999, which was the date we were supposed to meet. **So, you should know that the break in negotiations will not be adverse to you.**
>
> After Attorney Soto was well and we selected other dates, in all honesty, I had to cancel them either due to several business trips I had to make to Dallas, Singapore, Mexico, etc.; and finally because I also got sick. I am human too. Then Omar resigned and we had to appoint a new manager to bridge our committee. As you know, we were lucky that Nitza Corres accepted the position as I think she is not only competent… but well liked and accepted by most of you. I trust she will be an asset in improving our bonds here in St. Croix.
>
> We have been willing, and still are willing to reach an agreement with the union, if that's what you really want.
>
> But, I want to share with you a concern I have.
>
> During this waiting period we have received a request from some employees in writing to be excluded from the union or opposing the payment of dues. We afterwards learned to most of the new employees, and even some of the old employees do not favor the union. This has made us wonder if by voluntarily accepting to bargain with the union we may be forcing a membership that the majority of you really do not want.
>
> At present, perhaps we may not have what the NLRB calls enough objective evidence that this union may have lost its majority status. They normally require a showing that 30% of the employees either sign a written petition or in some outward form, like the letters we received, withdraw support of the union.
>
> But, there are several factors present here that suggest that perhaps rather than forcing a union on you, if that's not really what you want, we should file a petition with the NLRB to ask them to hold an election and allow you to really decide whether you want to continue to be represented by this union.

Among the factors are:

> 1. Our business is one of a high turnover. The employees that may have voted in favor of the union are not here in their majority . . . if there ever was an election. We don't know. We are trying to find out if the former employer accepted voluntarily the union or if there was an election. Perhaps if there are any employees that participated in an election then, you may help us. We are trying to resolve this question. We are not asking, as we cannot do so, whether you favor or not the union. Only, if anyone knows whether an election was ever held when I conclude my message.
>
> 2. This union is under a trusteeship. This happens when there are problems of corruption, finances and/or deficiencies in the union administration. The last report filed by this union only mentions the section of the by-laws under with they were placed in trusteeship. We have requested the federal government for copies of former reports and the by-laws in our quest to resolve our doubts of majority status.
>
> 3. The finances of the union are really poor. They sure need your dues as they are, if not bankrupt, in the position where their debt exceeds their assets.
>
> 4. It is my understanding that the majority of you are not paying dues directly to the union when we discontinued to check off since we had no bargaining agreement that would legally allow us to continue to deduct dues.
>
> 5. There are other considerations that we are looking into to decide if we should decide to challenge this union. Some of them are technical and we don't want to burden you with details. But, if we do, we will do so following

[10] The threesome then traveled to the Orange Grove KFC store for another mandatory meeting, where the speech was repeated. The next day, September 25, a mandatory meeting was held at the Fredericksted KFC store, where Hernandez gave the speech again.

> the appropriate legal channels. We have not decided we are inclined to do so because once we sign a contract we will tie you for three more years when we honestly doubt that is what you really want.
>
> Even if we may not think you need a union in KFC, **what you actually want is what we feel we should have clear.** But since we cannot interrogate you . . . and even taking a formal poll–which is legal–carry some risks; perhaps the best opportunity to express your will is through an election held officially the NLRB,
>
> Now, even if we file a formal application, this does not mean that the Board will agree to an election. They may consider that we do not have objective evidence to support it. The may deny it. And, that is why we are taking great care in getting our evidence together. Today, Attorney Soto will interview our managerial personnel as we cannot interrogate you to help us reach this decision but their input will be helpful.
>
> So why am I telling you all this?
>
> First of all, I feel it is my duty to keep you informed with truthful information as to what is taking place. This is not only legal, but a moral obligation because you have waited for raises for so many years without changing your attitude, your dedication and support for us. We owe this to you.
>
> Second, because as soon as we sit down with Mr. Mandrew to discuss the last item pending, we will end up with a three-year contract. Is this fair to you? I don't know.
>
> I would never refuse to bargain. It is not our style. We know us by now. But perhaps the best course of action to protect your rights under the National Labor Relations Act to decide whether to be represented by a union, or by this union in particular; is for us to petition for an election for your sakes as well as ours.
>
> So, does any one here know whether an election was ever held at KFC under the predecessor employer? Thank you. That is All.
>
> This union is under a trusteeship at present.

(G.C. Exh. 8.)

At the end of his speech, Hernandez conversed with the employees. Soon thereafter, six employees tendered written statements indicating that they no longer wanted to belong to the Union: Chandy Baptiste (September 26, 1999); Bertha Donelly (September 30, 1999); Jerome Francis, Constance Pryce and Dian Cruickshank (October 10, 1999);[11] and Schaine Greene (October 12, 1999). (G.C. Exh. 10.)

8. Mandrew unsuccessfully seeks to resume negotiations

In the meantime, Mandrew returned from New York. On October 6, he phoned Varona leaving a message that he wanted to resume negotiations. (Tr. 50.) Varona checked her phone messages on October 8, but did not returned his call. Rather, on October 11, she phoned Soto advising her that Mandrew had called seeking to resume negotiation. Soto specifically instructed Varona not to return Mandrew's call until "she told [her] to do so." (G.C. Exh. 12, p. 11.) Soto told Varona that she wanted to file the RM petition for election first. (Tr. 153.)

On October 12, Mandrew phoned Soto leaving a message that he had returned from New York and was prepared to resume negotiations. (Tr. 51.) Soto did not return the call. Instead, unbeknown to Mandrew, on October 12, Soto filed an RM petition with the Board's Regional Office attaching the six recently received written statements from the Respondent's employees. (G. C. Exh. 10.)[12] She also filed a position statement. (G.C. Exh. 9.)

On October 14, Mandrew phoned Varona leaving another voice mail message stating that he was available to meet on October 25, 1999. Four days later, on October 18, Varona returned Mandrew's October 14 phone call. She acknowledged receiving his initial phone call, but stated that the Respondent had filed an RM petition which he should have already received and that she wanted to put negotiations "on hold" until after the Board's Regional Office had reviewed the matter. (Tr. 146.) The next day, October 19, Mandrew filed a ULP charge.

9. The RM petition is dismissed

By letter, dated January 21, 2000, the Board's Regional Director dismissed the petition and determined that as a result of the pending complaint, the RM petition was being dismissed because no question concerning representation could be properly raised at the time. (G.C. Exh. 6.) The Board affirmed the dismissal on March 15, 2000, but stated that the petition was subject to reinstatement, if appropriate, upon the final disposition of the ULP case. (G.C. Exh. 7.)

B. The Reassigned Delivery Duties of Employee Kennedy Caines

Kennedy Caines began working for KFC, Caribbean Holdings, Inc. long before it was acquired by Tricon Restaurants International, Inc. From 1984–1994, he worked at the KFC warehouse making and deliverying cole slaw, potato salad, and beans to the three St. Croix KFC stores, as well as unloading frozen food trailers. (Tr. 155–157.)

Sometime in 1994, Caines was transferred to the Sunny Isle KFC store, where his primary duties were to make cole slaw and potato salad every day and to deliver these products to the other St. Croix KFC stores at least once a week. Occasionally, Caines was also asked to pick up and deliver other food supplies from store to store. ((Tr. 172.)

During Caines' tenure at the Sunny Isle KFC store, he was supervised by Dorita Trimmingham, an area manager who oversaw all three St. Croix KFC stores. Caines testified that when Trimmingham was area manager, she also delivered the cole slaw and potato salad to the other stores once a week. (Tr. 205.) In 1998, Trimmingham left KFC and was briefly replaced by her daughter, Releatha Burnett, as the store manager at the Sunny Isle store. Burnett testified that while Trimmingham was the area manager, Caines did not deliver the cole slaw and potato salad very often. Rather, Trimmingham delivered the salads, unless she was tied up, had meetings, or had to go to St. Thomas. (Tr. 373, 386.) Burnett later conceded that from 1990-

[11] These employees submitted separate, but similarly worded statements. (G.C. Exh. 10.)

[12] The statements tendered by Agnes Austrie and Reuel Young prior to September 24, 1999, were not submitted with the petition.

1998 she worked at a different KFC store, the Golden Rock store, and therefore did not have first hand knowledge of how often Caines made deliveries. Rather, she only saw Caines delivering cole slaw and potato salad to the Golden Rock KFC store once a week. (Tr. 398.) For these, and demeanor reasons, I credit Caines testimony regarding the frequency with which he delivered cole slaw and potato salads while Trimmingham was in charge.

Burnett also testified that when she first became store manager of the Sunny Isle store in late 1998, she delivered the cole slaw and potato salad to the other stores and that it customarily took her an hour and a half. (Tr. 374.) Although cole slaw and potato salad was supposed to be delivered by 10 a.m., she did not deliver them until 11 am or later. Thus, in early 1999, Omar Torres, the area marketing manager, assigned all of the delivery duties to Caines, which included delivering all of the cole slaw and potato salad to the other KFC stores to Caines (Tr. 375), as well as picking up food supplies from the warehouse and delivering them to the three St. Croix KFC stores. Shortly after the delivery duties were assigned to Caines, Burnett was transferred to the Fredericksted KFC store. (Tr. 381.)

For the next year, Caines made cole slaw and potato salad and delivered these items to the other St. Croix KFC stores at least three times a week. He also picked up food supplies from the warehouse and delivered them to the three stores. His regularly scheduled hours at the KFC Sunny Isle store were Monday-Friday, 7 a.m.–3 p.m. However, because of the delivery duties, he routinely worked 4–6 overtime hours per week. (G.C. Exh. 13.)

In August 1999, Torres resigned. He was replaced by Nitza Corres. Over the next several months, Corres received customer complaints that there were not enough salads at lunchtime. (Tr. 305, 421.) In addition, Corres was concerned about Caines' weekly overtime and more specifically that he was spending too much time running back and forth between stores delivering supplies.

On or about January 10, 2000, Corres decided to reassign the delivery duties to another bargaining unit employee, Samuel Queely, a maintenance worker, so that Caines could devote all of his time to making cole slaw and salads. (Tr. 426.) Corres testified that she assigned the delivery duties to Queely because he performed maintenance for all three KFC stores and therefore traveled to those stores anyway. According to Corres, the Sunny Isle store manager, Juliana Frances, explained to Caines the reasons for the reassignment. In addition, Corres also met with Caines and twice explained to him that he was no longer going to be delivering salads so he would have more time to make them.

C. Analysis and Findings

1. Section 8(a)(1) violation

Paragraph 7 of the complaint alleges that on September 23, 1999,[13] Human Resources Manager Juan Hernandez gave a speech to the employees at the three St. Croix KFC stores, asking them to desert the Union and resign their union memberships. Counsel for the General Counsel argues that in an effort to support the filing of the Respondent's RM petition, Hernandez solicited employees to withdraw their support and membership from the union, sought to cause employee disaffection, and sought to undermine the Union. The Respondent asserts that Hernandez' speech contained no threats or promises of benefits and therefore it was protected by Section 8(c) of the Act.

a. The coercive effect of Hernandez' statements

Section 8(a)(1) is violated when an employer interferes with, restrains, or coerces employees in the exercise of their rights guaranteed in Section 7. The test is whether the employer's statement may reasonably tend to interfere with the employees' exercise of their Section 7 rights. The test does not turn on the employer's motive or on actual effect. *Lee Lumber & Building Material*, 306 NLRB 408, 409 (1992).

The evidence shows that when the September 24 mandatory meeting started, Hernandez immediately told the St. Croix KFC employees that the St. Thomas KFC employees and the St. Croix Pizza Hut employees (that is, the nonunion employees) had been given a wage increase, but that the St. Croix KFC employees were not going to receive any wage adjustment. In addition, Hernandez reminded the St. Croix KFC employees that several months earlier the St. Thomas employees received another wage increase, which Respondent wanted to give them, but that the Union opposed.[14] (G.C. Exh. 8.) I find that Hernandez' remarks imply that the Union was not needed for the employees to obtain a wage increase. I further find that the statements created the impression that the Union was to blame for the fact that the St. Croix KFC employees had not received the wage increase—past and present—that had been given to the St. Thomas KFC employees.

Hernandez also pointed out that although bargaining had resumed, negotiations had been delayed due to the Respondent's inability to meet, but that that the Respondent would make any negotiated wage increase retroactive to March 12, 1999, so that the employees would not be adversely affected by the delay. I find that his statement implies that the Union was not needed in order for the employees to receive a retroactive wage increase.

The Courts and the Board have held such statements tend to coerce employees into withdrawing their support for the Union in violation of Section 8(a)(1), particularly where, as here, the parties are engaged in contract negotiations over a wage increase. *NLRB v. Otis Hospital*, 545 F.2d 252, 254-255 (1st Cir. 1976); *Marshall Durbin Poultry, Co.*, 310 NLRB 68, 69 (1993); *Kut Rate Kid & Shop Kwik*, 246 NLRB 106, 118 (1979)

[13] The evidence reflects that the speeches were actually given on September 24, 1999.

[14] By letter, dated May 28, 1998, Hernandez told Mandrew that "effective next week we are giving a salary increase to all our KFC and Pizza Hut associates in St. Thomas and St. Croix, retroactive to January 5, 1998 . . . ." (R. Exh. 20.) The Respondent's announcement of a unilateral wage increase, which the Union opposed, placed the Union in a compromising position. By opposing the unilateral increase, it risked disaffecting the bargaining unit employees. If it acquiesced in the Respondent's action, it would demonstrate its inability to protect its right as the exclusive bargaining representative of the employees. By reminding everyone that the Union opposed the prior unilateral wage increase, Hernandez exploited the Union's vulnerability.

The coercive effect of such statements therefore removes the speech from the protective scope of Section 8(c) of the Act.

Accordingly, I find that the above-referenced remarks by Hernandez violated Section 8(a)(1) of the Act.[15]

b. The Respondent's self-initiated campaign to persuade employees to withdraw from the Union

After telling the employees that they were not going to receive a wage increase, and reminding them that the Union had opposed an increase for them in the past, Hernandez then expressed his concern that, notwithstanding the delay, the employees might not want the Respondent to enter into an agreement with the Union. He told them that he was concerned about continuing to bargain with the Union because some employees had stated in writing that they wanted to be excluded from the Union or that they opposed paying union dues. He also told them that the Respondent had "learned" that most new employees and some old employees did not favor the Union. Although Hernandez conceded that there was insufficient objective evidence showing that the Union had lost its majority status, he told the employees that the Respondent was contemplating filing a petition for an election with the Board to allow them to vote, instead of "forcing a union" on them.

Hernandez gave several reasons for filing a petition. He told the employees that because of high turnover many of the employees who voted for the Union were no longer in the majority, if there ever was an election to begin with. He pointed out that the Union was under a trusteeship, which usually happens when there is corruption, financial problems, and deficiencies in union administration.[16] He opined that the Union was close to being bankrupt and therefore it needed their dues. He explained that there were other considerations that the Respondent was "looking into to decide if we should decide to challenge this Union." He told the employees that although the Respondent did not think that they needed a union, it wanted to give them the best opportunity to express their will. In effect, Hernandez' comments outlined for the employees all of the reasons why "they" should no longer want to be represented by the Union.

Hernandez concluded his speech by telling the employees that he was legally and morally bound to keep them informed, since they had waited so long for a wage increase without changing their attitude, dedication and support for the Respondent. He also wanted to do what was fair to them before finalizing a contract with the Union, which would bind them for three years. Hernandez concluded the speech by telling the employees that "perhaps the best course of action to protect your rights under the National Labor Relations Act to decide whether to be represented by a union, or by this union in particular; is for us to petition for an election . . . for your sake as well as ours."

It is not unlawful for an employer to correctly inform employees of their legal rights to resign from the union and revoke union-checkoff authorizations. See *Ace Hardware Corp.*, 271 NLRB 1174 (1984); *Perkins Machine Co.*, 141 NLRB 697 (1963); *Cyclops Corp.*, 216 NLRB 857 (1975). Nor is it unlawful for an employer to respond to questions asked by employees about decertification. It is unlawful, however, for an employer to initiate, stimulate, and induce employees to withdraw their support for their union.

In this case, there is no evidence that the employees had filed or were planning to file a decertification petition. There is no evidence that any employee had asked about the procedure for withdrawing from the Union or that anyone requested a meeting for that purpose.[17] There is no evidence that the employees needed assistance or wanted assistance in deciding whether they still wanted to be represented by the Union. Rather, the evidence shows that the Respondent initiated the idea that the employees might not want to be represented by the Union, told them that it did not think they needed a Union, told them that it was going to give them the opportunity "to decide whether to be represented by a union, or by this Union in particular," and then stimulated and solicited support for its position by putting the onus on the Union for their delayed wage increase, by implying that the Union was ineffective and inefficient, and by stressing that it was going to take action for the employees' benefit in order to protect their rights under the Act. *Architectural Woodwork Corp.*, 280 NLRB 930, 931 (1986); *Texaco Inc.*, 264 NLRB 1132, 1133 (1982); *Landmark International Trucks, Inc.*, 257 NLRB 1375, 1381-1382 (1981). The evidence, viewed as a whole, paints a picture of an employer who initiated a campaign to decertify the Union and solicited support for a petition that it was prepared to file by inducing employees to withdraw support for the Union. Under these circumstances, I find that the Respondent violated Section 8(a)(1) of the Act by actively interfering with the employees' statutory right to "self-organization" and to retain union membership as guaranteed by Section 7 of the Act.

2. Section 8(a)(5) unlawful refusal to bargain

a. The obligation to bargain

(1) The applicable legal standard

Under the rules, as set out in the Board's decision in *Celanese Corp.. of Amercia*, 95 NLRB 664 (1951), a certified union, upon the expiration of the first year following its certification, enjoys a rebuttable presumption that its majority representative status continues. The presumption continues to apply after the expiration of a collective-bargaining agreement, but may be rebutted by the employer in one of two ways. The employer

[15] Although the complaint does not specifically allege that these statements are unlawful, it is irrelevant. It is settled that the Board may find and remedy a violation even in the absence of a specific allegation in the complaint if the issue is closely connected to the subject matter of the complaint and has been fully litigated. *Pergament United Sales*, 296 NLRB 333, 334 (1989). Based on the evidence presented and the arguments by respective counsel in their posthearing briefs, I find that both parts of this test have been satisfied.

[16] Hernandez did not mention that the information acquired by the Respondent from the U.S. Department of Labor indicated that the Union had been in trusteeship throughout the entire time the Union represented the employees, that the reasons stated for the trusteeship had nothing to do with corruption, financial difficulties or poor union administration, and that the records indicated that the Union's dues receipts had increased over the last few years. (R. Exh. 10.)

[17] Up until that point, only two employees had expressed in writing that they did want to be union members. (R.Exhs. 9 and 15.)

must show that at the time of its refusal to bargain, either (1) the union did not in fact enjoy majority representative status, or (2) that it had a reasonable good-faith doubt as to the continued majority status of the union. *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 778 (1990). The employer's reasonable doubt must be based on objective considerations and must be raised in a context free of unfair labor practices. *Bolton-Emerson, Inc v. NLRB*,899 F.2d 104, 106 (1st Cir. 1990); *Guerdon Industries, Inc.*, 218 NLRB 658, 659 (1975).

In *Allentown Mack Sales & Service v. NLRB*, 522 U.S. 359, 367 (1998), a case involving polling, the Supreme Court held that the Board's good-faith doubt standard must be interpreted to allow an employer to withdraw recognition and refuse to bargain if it shows that it has a "reasonable uncertainty" of the union's majority status, rather than a reasonable disbelief, as required by the Board under *Celanese.* In addition, and of particular relevance to the present case, the Court held that evidence by way of employee statements expressing dissatisfaction with the union should be considered in determining whether the employer had reasonable, good-faith grounds to be uncertain about the union's majority status.

Most recently, in *Levitz Furniture Co. of the Pacific*, 333 NLRB 717 (2001), the Board overruled *Celanese* and it progeny insofar as they permit withdrawal on the basis of good-faith doubt and established a new standard requiring an employer to show, as a defense for unilaterally withdrawing recognition, that the union has actually lost majority status. The Board, however, stated that this higher evidentiary standard would be applied prospectively and that all pending cases, like this one, involving withdrawal of recognition under existing law would be decided under the good-faith uncertainty standard enunicated by the Court in *Allentown Mack*.[18] 333 NLRB 728.

In *Levitz,* the Board also described the kinds of evidence that employers may use to establish good-faith reasonable uncertainty in pending, as well as future cases. In addition to antiunion petitions signed by unit employees and firsthand statements by employees concerning personal opposition to an incumbent union, the Board stated that "employees' unverified statements regarding other employees' antiunion sentiments [and] employees' statements expressing dissatisfaction with the union's performance as a bargaining representative" could be considered in determining the evidentiary showing required to establish a good-faith reasonable uncertainty. Id. at page 12. The Board cautioned, however, that a determination of whether good-faith reasonable uncertainty exists must be made on objective evidence that reliably indicates employee opposition to incumbent unions – i.e., evidence that is not merely speculative.

(2) The Respondent's evidentiary showing

(a) Actual majority status

The Respondent argues that information received from the Union shows that it represented less than a majority of the bargaining unit employees. The evidence shows that on or about August 31, 1999, Mandrew mailed to the Respondent 19 union cards authorizing dues deductions, which for the most part, were signed by employees in October–December 1998.[19] (Tr.233; R. Exhs. 11, 14.) Mandrew presumably provided the cards to demonstrate employee support for the Union. The Respondent asserts that after reviewing the cards, it determined that five employees had been discharged or quit, two employees (Reuel Young and Agnes Austrie) had submitted written statements indicating that they no longer wanted to be members of the Union, and one employee, Agnes Austrie had actually signed two cards. Thus, the Respondent asserts that the dues deduction cards show that the Union did not represent a majority of the employees.

The Respondent's reliance on the dues-deduction cards is misguided. First, the evidence shows that at the time the cards were obtained, there was not even an obligation to deduct dues because the union-security provision has long since expired. That 18 employees voluntarily signed-up to pay dues[20] is a convincing manifestation of support for the Union, rather than against it. Second, that some employees did not voluntarily authorize the Respondent to deduct union dues from their paychecks does not establish that they were not union members or that they did not want the Union to represent them. Some employees may have wanted to be represented by the Union, but did not want to sign a sign a card or did not want to pay dues to the Union.

In addition, the fact that five employees were discharged or quit is of no consequence because, as explained below, the presumption is that the newly hired employees support the union in the same proportion as the employees they have replaced. Because there is no evidence that their replacements did not support the Union, the presumption is unrebutted.

Also, the letters submitted by employees Reuel Young and Agnes Austrie do not reflect that they opposed Union representation or that they were dissatified in anyway with the Union. The evidence shows that after discussing the matter with his store manager, Young completed a Respondent supplied personnel form on or about May 22, 1999, "requesting that I be out for the Union for KFC. I don't feel it necessary for me at this time." (R.Exh. 9.) On or about August 30, 1999, Austrie wrote "I'm Agnes Austrie and I would not like to be in the Union anymore." (R. Exh. 15, page 2.) These vague statements are not enough to establish a reasonable uncertainty, let alone, an actual loss of majority. Again, it is well settled that nonmembership in a union does not establish that those employees do not want the Union to represent them. *Henry Bierce Co.*, 328 NLRB 646 (1999).

Accordingly, I find that the Respondent has not shown that the Union does not, in fact, enjoy majority representative status.

[18] With respect to processing RM petitions, the Board further stated that it would continue to follow the good-faith reasonable uncertainty standard.

[19] The cards were signed by Laurie Bryan, Shirley Williams, Sherille Lawrence, Marsha Frederick, Lauren Carty, Reuel Young, Arlene Donelly, Gary Mason, Eileen Roach, Rosa Pascual, Chandy Baptiste, William P. Charles, Vincent Henry, Alvin Kentish, Maggie Francis, Hyacynth Francis, Bertha Donelly, and Kennedy Caines. A card signed by Agnes Austrie was dated August 29, 1998. (R. Exhs. 11, 14.)

[20] Agnes Austrie signed two cards.

(b) The lack of reasonable uncertainty

The Respondent next argues that it had a good faith belief (uncertainty) based on objective considerations that the Union had lost its majority status. Thus, the issues are whether the Respondent has made a sufficient evidentiary showing to establish reasonable uncertainty and whether that uncertainty was raised in good-faith?

The Respondent asserts that its uncertainty is supported by the Union's inactivity from January 1997 to May 1998. The Board historically has declined to find that a break in negotiations supports a good-faith doubt when that break is not attributed to loss of employee support. *Taft Coal Co.*, 321 NLRB 605, 609 (1996). Here, there is no evidence that the hiatus in negotiations was caused by loss of employee support. Nor is there any evidence that the Union abandoned its representative status during this time or that an employee had sought the Union's assistance and not received it. To the contrary, in a letter to Mandrew, dated June 26, 1998, Hernandez notes that Mandrew pursued an employee grievance concerning air conditioning units during this time. (R. Exh. 23, p. 2.) The evidence also shows that throughout the same time period the Respondent continued to recognize the Union as the exclusive bargaining representative by maintaining the automatic dues checkoff, even though the contract had expired in March 1997.

In addition, the evidence shows that in June 1998, the Union filed a refusal-to-bargain charge and in the fall of 1998 the Respondent resumed negotiating with the Union. Thereafter, the parties reached agreement on all, but one, of the remaining issues. The evidence also shows that after June 1998 the Union pursued the grievances of certain employees and diligently sought to conclude contract negotiations. Accordingly, I find that the Union's inactivity, which ended 17 months before the Respondent ultimately refused to finalize negotiations on one remaining issue, i.e., wages, is insufficient to establish a reasonable uncertainty of the Union's majority status.

The Respondent also asserts that high turnover among the bargaining unit employees supports its uncertainty about the Union's majority status. It points out that only one current employee, Eileen Roach, was employed at the time of the election (January 13, 1984) and argues that many of the new employees do not even know that they are represented by a Union. There is a well-established presumption, however, that newly hired employees support the union in the same proportion as the employees they have replaced, absent strong evidence to the contrary. *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 779 (1990); *Kelly's Private Car Service*, 289 NLRB 30, 43, (1988). The evidence here shows that the Respondent's fast food business is a high turnover business (See G.C. Exh. 9, p. 2, par. 2) and that over a 15-year period, there has been high turnover. There is no credible evidence, however, showing that the newly hired employees do not support the Union in the same proportion as the employees they were hired to replace. Even assuming that the Respondent could show, which it has not, that the employees, hired after the contract expired in March 1997, did not join the Union, it still would not have established a sound basis for inferring that they did not want to be represented by the Union because employees may have many reasons for wanting union representation, but not want to be union members. Because the Respondent has not presented any credible evidence to rebut the presumption, I find that high turnover is not a sufficient basis for uncertainty.

The Respondent also asserts that a sufficient basis for uncertainty exists because "none of the employees were (sic) paying dues."[21] There is no evidence, however, to support that assertion. Instead, the Respondent infers that no employees were paying dues from an off-the-cuff remark by Mandrew "that employees were not paying dues," which he made at a negotiation session on an unspecified date after the Respondent ceased withholding dues in June 1998 and which he purportedly repeated during the telephone conversation with Varona in late August 1999. However, Mandrew did not state, nor does the evidence show, that no employees were paying union dues. The Respondent's unsupported assertion is therefore insufficient to establish a reasonable basis for uncertainty.

The Respondent also relies on the writings submitted by nine employees, who indicated that they do not want to be in the Union anymore or that they do not consider themselves to be union members. Two of the writings (those of Agnes Austrie and Reuel Young), were dated prior to the September 24 speech, and are discussed above. Another, submitted by employee Renebelle James in October 1995, is very remote in time and was sent while the contract was still in effect. On that basis, alone, his letter is insufficient to establish a reasonable basis for uncertainty. In addition, James did not express opposition or dissatisfaction with the Union. Rather, the letter states "I am requesting that I be taken out of the union effective immediately. My reason for this is simply that I don't feel I need to be in the union, also I am not financially able." (R. Exh. 15.) The evidence supports a reasonable inference that he no longer wanted to be a union member because he did not want to pay union dues. Finally, the evidence shows that James did not verbally renew a desire to withdraw from the Union until after the September 24th speech. Thus, I find that the pre-September 24 written statements by James, Austrie, and Young are insufficient to establish a reasonable uncertainty.

With respect to the writings submitted by six employees after September 24, 1999, I find that they were induced and elicited by Hernandez' speech and therefore cannot be relied upon to establish a reasonable uncertainty.

Finally, the Respondent relies on the testimony of three store managers who met individually with Hernandez, Attorney Soto, and Varona after the September 24 meetings to discuss what they were told by employees, or what they overheard employees stating about the Union. (Tr. 298.)

Juliana Francis is the manager of the Sunny Isle KFC store. She testified that after the September 24 speech Renebelle James, Arlene Donelly, and Joann Cruiskshank came to her stating that they did not want to be part of the Union. (Tr. 327, 361-362.) She stated that Employee Renebelle James stated "strongly that she doesn't want to be, you know, need to be represented by the Union." She also heard Employees Arlene Donelly and Joann Cruiskshank state that "they don't need to be represented by a Union, that they don't pay Union dues be-

[21] See Respondent's posthearing brief at p. 58.

cause they just don't want to be represented." (Tr. 326.) Francis testified that she related this information to Attorney Soto after the September 24 meeting. (Tr. 369.) Because the evidence shows that the employees spoke to Francis after the September 24 meeting, I find that their comments are tainted by the September 24th speech, and therefore the Respondent cannot rely on them to support its reasonable uncertainty defense.

Francis also testified that while dues checkoff was still in effect, she overheard Employee Shirley Williams state "well I'm not going to the [Union] meeting anymore because it was poorly attended and I don't want to pay Union dues." (Tr. 327.) The evidence shows, however, that on October 31, 1998, Employee Shirley Williams signed a dues-checkoff card. (R. Exh. 14, page 3). The fact that Williams voluntarily signed a dues-checkoff card long after the Respondent terminated automatic dues checkoff undermines Francis' testimony and supports a reasonable inference that Williams supported the Union. In addition, Francis' testimony was somewhat inconsistent and equivocal. On cross-examination, she was unsure when she overheard Williams and then contradicted herself by testifying that the statement was made in 1999. (Tr. 383.) For these, and demeanor reasons, I do not credit Francis' testimony regarding statements purportedly made by Shirley Williams. Thus, the testimony concerning Williams is insufficient to support a reasonable uncertainty.

Releatha Burnett is the manager of the Fredericksted KFC store. She testified that sometime after she became store manager in February-March 1999, several employees approached her to inquire why they had signed union cards. (Tr. 379.) She further testified that Employee Reuel Young, who had signed a dues-checkoff card, on or about December 14, 1998, told her that he did not want to belong to the Union (Tr. 380) and that he asked her what he should do. Burnett told him to write a letter stating that he did not want to belong to the Union and that she would send it to KFC headquarters in Puerto Rico. (Tr. 380.) The evidence shows that Young submitted a letter, dated May 22, 1999. (R. Exh. 19.)

Burnett also testified that Employee Chandy Baptiste told her that "she doesn't want to be in the Union. She don't feel that she needs to be in the Union." (Tr. 380.) Burnett testified that she gave Baptiste a personnel action form in April 1999 and told her to write a letter explaining why she did not want to belong to the Union, which Burnett would send to KFC headquarters in Puerto Rico. (Tr. 386.) The Burnett's testimony concerning the timing of the conversation is suspect. The evidence shows that Baptiste's personnel action form was dated, September 26, 1999, and Burnett conceded that she did not receive the letter until a few days after the September 24th speech. (G.C. Exh. 10, page 2; Tr. 391.) I do not credit Burnett's testimony that she spoke to Baptiste 5-months earlier about submitting a letter. Rather, given the date of the personnel action form and the admission that it was not received until after the September 24th speech, I find that it is more likely, than not, that Burnett and Baptist spoke after the speech. Thus, I find that Baptiste comments and letter about the Union were induced and elicited by the September 24 speech and therefore cannot be relied upon to support a reasonable uncertainty.

Finally, Burnett testified that sometime prior to February 1999, while she was still working in the Sunny Isle store, an employee named Sue Ann Young told her that she did not sign a union card because "she was not interested in that." (Tr. 382.) I find that this vague statement is of no probative value because it is remote in time and it is does not necessarily show that Young did not want the Union to represent her. In addition, the evidence shows that as of September 1999, Sue Ann Young was no longer listed as an employee of the Respondent. (See R. Exh. 12.) Thus, any statement that she made more than seven months earlier cannot be considered as a basis for reasonable uncertainty in October 1999 because she was no longer an employee. Accordingly, I find that this aspect of Burnett's testimony is insufficient to support a reasonable uncertainty.

Mary Noelien is the manager of the Orange Grove KFC store. She stated that employees Bertha Donelly and Jerome Francis told her that they did not want to be in the Union. (Tr. 407.) Noelien could not recall when Donelly and Jerome Francis spoke to her, except to state that it was last year, i.e., 1999. (Tr. 408.) The evidence shows that Bertha Donelly submitted a written statement on or about September 30, 1999, indicating she wanted "to be out of the union immediately." (R. Exh. 10, page 1.) The evidence also shows that on October 10, 1999, Jerome Francis submitted a written statement indicating "I am not a member of the Labour Union and have know interest of joining the Union." (R. Exh. 10, p. 3.) Based on the dates of the employee's statements, and the fact that Noelien could not recall specifically when she spoke to these employees, I find that the conversations, like the letters, evolved after the September 24th speech and therefore cannot be considered to support a reasonable uncertainty.

Noelien also testified that "way before" the September 24th speech employee Agnes Austrie came to her stating that she did not want to be in the Union. (Tr. 413.) As noted above, on or about August 30, 1999, Austrie submitted a written statement indicating "I would not like to be in the Union anymore." (R. Exh. 15.) Although I credit the testimony that Austrie did not want to be a Union member, there is no evidence indicating that she did not want the Union to represent her or that she was dissatisfied with the Union. Thus, I find that this evidence does not support a reasonable uncertainty concerning the Union's majority status.

In addition, Noelien testified that "she had heard that the majority of the employees do not want to be Union." (Tr. 407.) She testified that she overheard some employees state that they did not want to be in the "Union because the Union is not doing anything for them and even though they haven't gotten raises in almost three years they are still satisfied with the company." (Tr. 409.) Noelien also added that "our employees are very—they have an excellent attitude with the company. They like to work with the company. They feel good working for KFC." (Tr. 409.)

Noelien could not recall when she overheard these conversations, except to state that it was in 1999. (Tr. 414.) She also testified that she overheard Joann Cruiskshank, Marsha Frederick, Nickey Alcee, Cecilia Antoine, and other employees whose names she could not recall state that they did not want to be in the Union. (Tr. 413.)

I do not credit this aspect of Noelien testimony for several reasons. First, she did not specify whether she overheard one or more conversations nor was she able to specify when the conversation(s) purportedly took place, other than to state in 1999. Second, her testimony as to who she overheard talking about the Union is inconsistent with a prior position statement submitted by the Respondent, which was based, in part, on an interview with Noelien contemporeanous with the September 24th speech. (R. Exh. 9, p. 6.) Based on the information obtained from its three store managers on or about September 24, the Respondent's attorney prepared a position statement to support its RM petition, which on page 6 states:[22]

> The three Managers identified – in addition to Young, Austrie, and James—the following employees that have come forth to oppose the union verbally:
>
> Chandy Baptiste, Sueann Young, Jerome Francis, Bertha Donnelly, Joann Cruiskshank, Arlene Donnely, and Jacqueline Jackman.

There is no mention of Marsha Frederick, Nickey Alcee and Cecilia Antoine in the position statement. Nor does it argue "make weight" that there were "others" whose names could not be recalled. Noelien's testimony therefore is inconsistent with the Respondent's prior statement that was based on information provided by Noelien and the other managers. In addition, I find that Noelien manifested a deep-seated bias in favor of the Respondent as reflected by her gratituous assertions about employee loyalty. For these, and demeanor reasons, I do not credit Noelien's testimony that she overheard comments made by Frederick, Alcee, Antoine, and others opposing the Union. Nor is there any credible evidence to support her general conclusory assertion that a majority of employees did not want to be in the Union.

Thus, in the aggregate, the credible evidence shows that two out of 41 employees, Reuel Young and Agnes Austrie, made verbal and written statements prior to September 24, 1999, that they did not want to be union members. The evidence also shows that possibly a third employee, Joann Cruickshank, verbally communicated to her supervisor prior to September 24 that she did not want to be a Union member. None however expressed dissatisfaction with the Union. All of the other employee comments were made after the September 24 speech.[23] I find that the statements of 3 out of 41 employees are insufficient to establish a reasonable uncertainty that the Union still represents a majority of the employees.

Viewed in perspective, the Respondent asserts that the Union was inactive for 17 months and that there was high turnover and little support for the Union among the new employees. The evidence shows that the employees had not received a wage increase in 3 years and that collective bargaining had dragged on for several months. Yet, despite all of this, there is no evidence that any employee asked about getting rid of the Union. There is no evidence that any employee stated that they wanted to vote the Union out. Instead, the evidence shows that two, possibly three, employees stated they did not want to be Union members. I find the credible evidence, viewed as a whole, to be insufficient to support the Respondent's asserted uncertainty of majority status.

(c) The lack of good faith

A claim of good-faith uncertainty is neither held in good-faith nor reasonable if timed to undermine the union's representational role, and if raised in a context of illegal antiunion activities, or other conduct by the employer aimed at causing disaffection from the union. See, e.g., *Auciello Iron Works*, 317 NLRB 364, 369; *Master Slack Corp.*, 271 NLRB 78, 84 (1984); *Rohlik, Inc.*, 145 NLRB 1236, 1243 (1964) (a good-faith doubt is not a 'doubt', which has been prompted, encouraged, and solicited by the employer.). I find that the Respondent's uncertainty lacked good faith for the following reasons. First, the evidence shows that the bases asserted by the Respondent for doubting the Union's majority status existed, and was known to, the Respondent long before October 6, 1999. The evidence shows that the Respondent was well aware of the Union's inactivity, the high turnover, and the discontinuation of dues checkoff, as early as June 1998. In a letter of June 26, 1998, Hernandez asserted doubt, but failed to act upon that doubt, when he told Mandrew "[e]ven if you should still represent the majority of the employees, which we seriously doubt, you made NO EFFORT to negotiate since 1996." (R. Exh. 23.) Instead, the Respondent resumed negotiations with the Union reaching agreement on all, but one, issue—wages. The failure of the Respondent to act sooner supports a reasonable inference that it did not believe that it had sufficient evidence to support a reasonable uncertainty and therefore it was compelled to hold a captive audience meeting to cause dissaffection with Union and raise support for its RM petition.

Second, the timing of the Respondent's asserted uncertainty also supports a reasonable inference of bad faith. The evidence shows that with an agreement close at hand,[24] the Respondent repeatedly postponed and delayed further negotiations while it ought to obtain information about the Union's ability to represent the employees. The evidence discloses that on August 27, 1999, Varona postponed the negotiation session scheduled for August 30, and on the same day phoned the U.S. Department of Labor seeking information about the Union's financial status. (G.C. Exh. 12, page 4.) Information which had no bearing on the Union's majority status, but could, and would, be used to undermine the Union. The evidence shows that the Respondent waited for the most opportune time, that is, when Mandrew had left the island of St. Croix for New York, to call a mandatory meeting to announce that the employees would not receive a

[22] Attorney Soto met with Noelien, and the other managers, individually to elicit from them information concerning employee support for the Union. She then had each manager sign notarized a statement memorializing what they told her, which was submitted in support of the position statement.

[23] This would include the written statements by employees, Constance Pryce, Dian P. Cruickshank, and Schaine Greene.

[24] In a letter of April 12, 1999 to Mandrew, Attorney Soto opined that in the next session of negotiations the parties should be able to "reach a full agreement as we anticipate will be the case." (G.C. Exh. 4B.) She later reiterated that statement in a letter of July 30, 1999 to Mandrew by stating "[hopefully, we should wind this up in just one session." (G.C. Exh. 4E.)

wage increase like everyone else; to express its "concerns" about the Union's majority status; and to explain why it believed that the Union was incapable of adequately representing their interests. In his speech, Hernandez stated that he was telling the employees all of this because of the Respondent's legal and moral obligation to them, and to protect their rights under the Act "to decide whether to be represented by a union, or by this Union in particular." (G.C. Exh. 8, page 9.) I find that the timing of the Respondent's meeting to assert its uncertainty and the invocation of employee free choice as a rationale for doing so is suspect and also evidence of bad faith. See, *Auciello Iron Works v. NLRB,* 517 U.S. at 790.

Finally, in the September 24th speech, Hernandez implied that the Union was ineffective, inadequate, and not needed. He also implied that the Union was to blame for the lost wage increases. The message was crafted to undermine the Union's representational status, as much as it was to articulate the Respondent's uncertainty. Within days of the speech, six employees submitted handwritten and/or typed notes indicating that they no longer wanted to be members of the Union. Thus, the evidence shows that the speech caused employee disaffection.

Accordingly, I find that the Respondent's uncertainties were not asserted in good faith.

(d) The refusal to bargain

The Respondent unlawfully withdrew recognition of the Union. It had an obligation to recognize and bargain with the Union on October 6, 1999, and at all times thereafter. The Respondent argues that it did not refuse to bargain with the Union. Rather, it only postponed bargaining pending on the outcome of its RM petition. The argument is unconvincing. The evidence discloses that despite Mandrew's request to bargain on October 6, which the Respondent chose to ignore, and his subsequent phone calls on October 12 and 18, the Respondent has made no effort to resume negotiations. Although its RM petition was dismissed by the Board's Regional Director and its appeal was denied by the Board, the Respondent has not recognized the Union and resumed bargaining. Thus, contrary to the Respondent's assertion, I find that on October 6, 1999, and at all times thereafter, it unlawfully refused to recognize and bargain with the Union in violation of Section 8(a)(5) of the Act.

3. The RM petition

By Order, dated March 15, 2000, the Board affirmed the Regional Director's adminstrative dismissal of the RM petition with the caveat that it was subject to reinstatement, if appropriate, upon final disposition of the pending unfair labor practice proceeding. (G.C. Exh. 7.) In light of the above determinations, I find no basis for reinstating the Respondent's RM petition.

4. The unlawful Section 8(a)(5) changes to terms and conditions of employment

The issue presented is whether the Respondent was obligated to bargain with the Union over the reassignment of delivery duties from Kennedy Caines to Samuel Queely? The credible evidence shows that although Caines' official job title was food service worker, he actually was the salad and cole slaw maker for the three KFC St. Croix stores. (Tr. 336.) In addition to making the salads, the evidence shows that Caines delivered these products to the other KFC St. Croix stores, routinely from late 1998 to early 2000. In January 2000, the duties were reassigned to another bargaining unit employee who did not accrue overtime pay for making the deliveries.

There is no evidence that the Respondent provided the Union with prior notice or an opportunity to bargain before implementing the change. The Respondent asserts that it had the right to unilaterally change Caines' duties because the expired contract contained a management-rights clause which constituted a waiver of the Union's right to bargain. It is well established that the waiver of a union's right to bargain does not outlive the contract that contains it, absent some evidence of the parties' intention to the contrary. *Paul Mueller Co.,* 332 NLRB 312, 313 (2000). There is no evidence of that the parties intended the management-rights clause to outlive the contract. Thus, the Respondent cannot rely on the management rights clause in the expired contract to justify its unilateral change of the terms and conditions of Caines' employment.

The Respondent also asserts that because there was no demonstrable adverse impact on the bargaining unit employees as a whole no violation should be found. The Board has stated, however, that a change in terms or conditions of employment affecting one employee can nevertheless violate Section 8(a)(5) and (1) of the Act. *Carpenters Local 1031,* 321 NLRB 30, 32 (1996). The evidence discloses that the unilateral change in Caines' terms and conditions of employment resulted in the loss of 4-6 hours of overtime a week.

Finally, the Respondent argues that it had legitimate business reasons such as reducing the amount of overtime hours and assuring customer satisfaction. The decision to reduce overtime by transferring the delivery duties to another employee is a mandatory subject of bargaining, which requires the Respondent to give notice to and bargain with the Union concerning the decision and its effects. See *United Gilsonite Laboratories,* 291 NLRB 924 (1988).

Accordingly, I find that the Respondent violated Section 8(a)(5) of the Act by unilaterally changing the terms and conditions of employee Kennedy Caines as alleged in paragraph 9 of the complaint.

CONCLUSIONS OF LAW

1. The Respondent, Kentucky Fried Chicken, Caribbean Holdings, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The following employees of the Respondent constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> INCLUDED: All service and maintenance employees, including warehouse employees, employed by the Employer at its restaurants located in Sunny Isle, Golden Rock and Frederickssted, St. Croix, U.S. Virgin Island.
>
> EXCLUDED: All managerial employees, office clerical employees, guards and supervisors as defined in the Act.

4. At all times since September 1, 1993, the Union has been the exclusive bargaining representative in the above-described unit within the meaning of Section 9(a) of the Act.

5. By implying on September 24, 1999, that the Union was not needed in order for the employees to obtain a wage increase; that the Union was not needed in order to make the employees whole retroactively for any wage increase that may be negotiated; and that the Union was to blame because the employees had not received a wage increase, the Respondent interfered with, restrained, and coerced the employees in the exercise of rights guaranteed by Section 7 of the Act, and thereby violated Section 8(a)(1) of the Act.

6. By soliciting support on September 24, 1999, for a petition for a representational election and by encouraging employees to withdraw support for the Union, the Respondent interfered with, restrained, and coerced the employees in the exercise of rights guaranteed by Section 7 of the Act, and thereby violated Section 8(a)(1) of the Act.

7. By refusing to recognize and bargain with the Union on and after October 6, 1999, as the exclusive bargaining representative of the aforesaid appropriate unit, the Respondent violated Section 8(a)(5) of the Act.

8. By unilaterally changing the terms and conditions of employment of Kennedy Caines on January 10, 2000, the Respondent violated Section 8(a)(5) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act, including recognizing and, upon request, bargaining with the Union and posting an appropriate notice.

The Respondent having unlawfully unilaterally changed the terms and conditions of employment of Kennedy Caines resulting in the loss of overtime hours shall make Kennedy Caines whole for all overtime hours lost since January 10, 2000, including interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[24]

ORDER

The Respondent, Kentucky Fried Chicken, Caribbean Holdings, Inc., St. Croix, U.S. Virgin Islands, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Unlawfully implying that the Union is not needed in order for the employees to obtain a wage increase; that the Union is not needed in order to make employees whole retroactively for any wage increase that may be negotiated; and that the Union is to blame because the employees have not received a wage increase.

(b) Unlawfully soliciting support for the Respondent's petition for a representational election and unlawfully encouraging employees to withdraw support for the Union.

(c) Failing and refusing to recognize bargain with the Union as the exclusive bargaining representative of the following appropriate unit:

> INCLUDED: All service and maintenance employees, including warehouse employees, employed by the Employer at its restaurants located in Sunny Isle, Golden Rock and Fredericksted, St. Croix, U.S. Virgin Island.
>
> EXCLUDED: All managerial employees, office clerical employees, guards and supervisors as defined in the Act.

(d) Unilaterally changing the terms and conditions of employment of Kennedy Caines.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed under Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, recognize and bargain collectively in good faith with the Union as the exclusive collective-bargaining representative of the unit employees with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment and, if an agreement is reached, embody such understanding in a signed agreement.

(b) Rescind the decision to transfer the delivery duties formally performed by Kennedy Caines up until January 10, 2000 and immediately reinstate those duties to Kennedy Caines.

(c) Within 14 days from the date of this Order, make Kennedy Caines whole for any lost overtime earnings that he would have received had he continued to perform the delivery duties after January 10, 2000.

(d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of the records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its three stores in St. Croix, U.S. Virgin Islands, copies of the attached notice marked "Appendix."[25] Copies of the notice, on forms provided by the Regional Director for Region 24, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these pro-

[24] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[25] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

ceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 24, 1999.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. May 4, 2001

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT unlawfully imply that the Union is not needed in order for our employees to obtain a wage increase.

WE WILL NOT unlawfully imply that the Union is not needed in order to make our employees whole retroactively for any wage increase that may be negotiated.

WE WILL NOT unlawfully imply that the Union is to blame because our employees have not received a wage increase.

WE WILL NOT solicit support for our petition for a representational election and encourage employees to withdraw support for the Virgin Islands Workers Union, HEREIU, AFL–CIO.

WE WILL NOT refuse to recognize and bargain collectively in good faith with respect to wages, hours, and other terms and conditions of employment with the Virgin Islands Workers Union, HEREIU, AFL–CIO, as the exclusive collective-bargaining representative of employees in the following appropriate bargaining unit.

INCLUDED: All service and maintenance employees, including warehouse employees, employed by the Employer at its restaurants located in Sunny Isle, Golden Rock and Frederiksted, St. Croix, U.S. Virgin Island.

EXCLUDED: All managerial employees, office clerical employees, guards and supervisors as defined in the Act.

INCLUDED: All service and maintenance employees, including warehouse employees, employed by the Employer at its restaurants located in Sunny Isle, Golden Rock and Frederiksted, St. Croix, U.S. Virgin Island.

EXCLUDED: All managerial employees, office clerical employees, guards and supervisors as defined in the Act.

WE WILL NOT refuse to bargain collectively with the Virgin Islands Workers Union, HEREIU, AFL–CIO by unilaterally changing the terms and conditions of Kennedy Caines.

WE WILL NOT in any manner interfere with, restrain, or coerce our employees in the exercise

of the rights guaranteed them by Section 7 of the Act.

WE WILL, on request, recognize and bargain in good faith with the Virgin Islands Workers Union, HEREIU, AFL–CIO, as the exclusive bargaining representative of our employees with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment and, if an agreement is reached, embody such understanding in a signed agreement.

WE WILL rescind our decision to transfer the delivery duties performed by Kennedy Caines prior to January 10, 2000, and immediately reassign those delivery duties to him.

WE WILL, within 14 days from the date of this Order, make Kennedy Caines whole for any lost overtime earnings that he would have received had he continued to perform the delivery duties after January 10, 2000.

WE WILL recognize and bargain in good faith with the Virgin Islands Workers Union, HEREIU, AFL–CIO, concerning the terms and conditions of employment of Kennedy Caines.

KENTUCKY FRIED CHICKEN, CARIBBEAN HOLDINGS, INC.